

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
Plaintiff,  
  
v.  
  
JOHN THAT LUONG,  
Defendant.

NO. CR-99-433-01 WBS  
  
ORDER

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On April 29, 2015, the Ninth Circuit Court of Appeals affirmed defendant John That Luong's conviction, partially vacated his sentences under 18 U.S.C. § 924(c), and remanded for resentencing. (Docket No. 1623.)<sup>1</sup> The Ninth Circuit vacated defendant's conviction and sentence on Count 2. (Id. at 6.) It also vacated the sentence on Count 5 and instructed the court to resentence defendant to five years' imprisonment on that count. (Id. at 6.) On September 1, 2015, the parties submitted a

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<sup>1</sup> The mandate issued on July 20, 2015. (Docket No. 1624.)

1 stipulation and proposed order for the amended sentence in  
2 accordance with the Ninth Circuit's decision. (Docket No. 1630.)

3 On October 27, 2015, defendant's appointed counsel  
4 moved to withdraw at defendant's request based on a conflict.  
5 (Docket No. 1633.) The court granted the motion and ordered that  
6 defendant be brought before the court for his resentencing.  
7 (Docket No. 1635.) Counsel's motion was also filed and granted  
8 in the Ninth Circuit. Defendant, proceeding pro se, now moves to  
9 waive his appearance and allocution at resentencing before this  
10 court. (Docket No. 1636.)

11 "The Sixth Amendment secures to a defendant who faces  
12 incarceration the right to counsel at all 'critical stages' of  
13 the criminal process." Iowa v. Tovar, 541 U.S. 77, 87 (2004).  
14 "It has long been understood that sentencing is a 'critical  
15 stage' at which a defendant is entitled to counsel." United  
16 States v. Yamashiro, 788 F.3d 1231, 1235 (9th Cir. 2015); see  
17 also Mempa v. Rhay, 389 U.S. 128, 136-37 (1967) (holding that a  
18 deferred sentencing hearing is a critical stage despite the  
19 limited discretion afforded the sentencing judge). "[T]he  
20 absence of counsel during a critical stage of a criminal  
21 proceeding is precisely the type of 'structural defect' to which  
22 no harmless-error analysis can be applied." United States v.  
23 Hamilton, 391 F.3d 1066, 1070 (9th Cir. 2004).

24 "Once a defendant makes an unequivocal request to  
25 proceed pro se, the court must hold a hearing--commonly known as  
26 a Faretta hearing--to determine whether the defendant is  
27 knowingly and intelligently forgoing his right to appointed  
28 counsel." United States v. Farias, 618 F.3d 1049, 1051-52 (9th

1 Cir. 2010). "In order to deem a defendant's Faretta waiver  
2 knowing and intelligent, the district court must insure that he  
3 understands 1) the nature of the charges against him, 2) the  
4 possible penalties, and 3) the 'dangers and disadvantages of  
5 self-representation.'" United States v. Erskine, 355 F.3d 1161,  
6 1167 (9th Cir. 2004) (citation omitted). "This is best  
7 accomplished by the trial court conducting a discussion with the  
8 defendant, in open court and on the record, of the critical  
9 elements and risks of self-representation." McCormick v. Adams,  
10 621 F.3d 970, 976-77 (9th Cir. 2010). "It is an unusual case  
11 where, absent such a colloquy, a knowing and intelligent waiver  
12 of counsel will be found." United States v. Rylander, 714 F.2d  
13 996, 1005 (9th Cir. 1983).

14 Defendant has attached a one-paragraph affidavit to his  
15 motion simply stating that he does not "wish to appear in person"  
16 for resentencing. Given that defendant has been represented by  
17 two different attorneys during the course of these proceedings,  
18 the court is reluctant to say with certainty that defendant has  
19 knowingly and voluntarily waived his right to counsel at  
20 resentencing. Therefore, before resentencing, the court will  
21 conduct the appropriate inquiry to ensure that defendant is "made  
22 aware of the dangers and disadvantages of self-representation, so  
23 that the record will establish that he knows what he is doing and  
24 his choice is made with eyes open." Faretta v. California, 422  
25 U.S. 806, 835 (1975); see Patterson v. Illinois, 487 U.S. 285,  
26 298-300 (1988) ("[W]e have imposed the most rigorous restrictions  
27 on the information that must be conveyed to a defendant, and the  
28 procedures that must be observed, before permitting him to waive

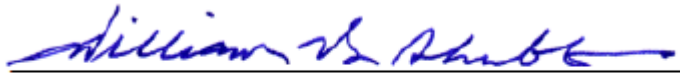
1 his right to counsel.") "It is the solemn duty of a federal  
2 judge before whom a defendant appears without counsel to make a  
3 thorough inquiry and to take all steps necessary to insure the  
4 fullest protection of this constitutional right at every stage of  
5 the proceedings." Von Moltke v. Gillies, 332 U.S. 708, 722  
6 (1948).

7 IT IS THEREFORE ORDERED that defendant's motion to  
8 waive his appearance and allocution at resentencing be, and the  
9 same hereby is, DENIED.

10 The United States Attorney shall make the necessary  
11 arrangements for defendant to be brought to court for  
12 resentencing, in accordance with this Order.

13 IT IS SO ORDERED.

14 Dated: November 12, 2015

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16 WILLIAM B. SHUBB  
17 UNITED STATES DISTRICT JUDGE  
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